Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1754

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY AND STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY

Petitioners

vs.

TIMOTHY JANOWIAK,

Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Patrick T. McFadden
McFADDEN AND McFADDEN
220 S. Taylor Street
South Bend, Indiana 46625
Telephone: (219) 233-9338

Attorneys for Respondent

No. 87-1754

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE CORPORATE CITY OF SOUTH BEND, BOARD OF PUBLIC WORKS, SOUTH BEND FIRE DEPARTMENT, MAYOR ROGER PARENT, TIMOTHY BRASSELL, FIRE CHIEF, ROBERT POTVIN, BOARD OF PUBLIC SAFETY AND STANLEY M. PRZYBYLINSKI, BOARD OF PUBLIC SAFETY

Petitioners

vs.

TIMOTHY JANOWIAK,

Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Patrick T. McFadden
McFADDEN AND McFADDEN
220 S. Taylor Street
South Bend, Indiana 46625
Telephone: (219) 233-9338

Attorneys for Respondent

QUESTION PRESENTED

May a municipality adopt an Affirmative Action Plan that operates to exclude non-minorities from being hired in the absence of any evidence of past discrimination against minorities, other than that minority representation on the municipal fire department is not commensurate with minority representation among the general population of the municipality?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATEMENT OF THE CASE:	
A. FACTS AND BACKGROUND...	4
B. DECISIONS BELOW.....	9
REASON FOR NOT GRANTING THE PETITION:	
PETITIONER'S ASSERTION THAT THE FEDERAL APPELLATE COURTS HAVE CREATED AN IRRECONCILABLE CONFLICT OVER WHETHER GENERAL POPULATION STATISTICS CAN BE THE BASIS FOR COMPARISON TO JUSTIFY A VOLUNTARY PUBLIC AFFIRMATIVE ACTION PLAN IS INVALID.	
A. JOHNSON v. TRANSPORTATION AGENCY and succession cases are distinguished from the instant case	
PETITIONERS' ALLEGATION THAT THE CIRCUITS HAVE CREATED AN IRRECONCILABLE CONFLICT	

OVER WHETHER THE GENERAL POPULATION CAN BE THE BASIS FOR THE COMPARISON TO JUSTIFY A VOLUNTARY PUBLIC AFFIRMATIVE ACTION PLAN IS WITHOUT MERIT, i.e., THE CASES CITED ARE DISTINGUISHABLE..... 10

CONCLUSION..... 26

TABLE OF AUTHORITIES

Page

Cases

Bratton v. City of Detroit, 704 F. 2d 878 (6th Cir. 1983).... 16

Hammon v. Barry, 826 F. 2d 73 (D.C. Cir. 1987)..... 22,23

Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987).. 17,18,19, 20,21,22

Janowiak v. City of South Bend, 750 F.2d 557 (7th Cir. 1984)..... 21,22

Janowiak v. City of South Bend, 836 F.2d 1034 (7th Cir. 1987)..... 1,13, 14,19

Johnson v. Transportation Agency, ___U.S.___ 107 S. Ct. 1442, 94 L.Ed. 2d 615 (1987)..... 10,11,12, 14,17,18, 20,21,22, 23,24

Wygant v. Jackson Board of Education, 476 U.S.___, 106 S. Ct. 1842, 90 L.Ed. 2d 260 (1986)..... 15, 16

United States Constitutional Provisions

Fourteenth Amendment..... 2,7, 25

Statutes

28 U.S.C. §1254..... 1

28 U.S.C. §1331..... 8

28 U.S.C. §1343..... 8

42 U.S.C. §1983..... 2,8

42 U.S.C. §2000(e)..... 3,8

OPINIONS BELOW

The Opinion of which review is sought is reported at 836 F.2d 1034 (7th Cir. 1987), and is reproduced at pages 1a-42a of petitioners' Appendix. The District Court Opinion is reported at 576 F. Supp. 1461 (N.D. Ind. 1983), and is included at pages 86a-117a of the petitioners' Appendix.

JURISDICTION

The Seventh Circuit Court of Appeals decided this case on December 16, 1987. A timely Petition for Rehearing was filed by Defendants-Appellees, but it was denied on February 23, 1988.

This Court's jurisdiction arises pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based in part upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which provides in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions involved are:

(1) 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(2) 42 U.S.C. §2000(e):

It shall be an unlawful employment practice for an employer - (1) To fail or refuse to hire or to discharge any individual, ... because of such individual's race, color, religion, sex, or national origin; ...

STATEMENT OF THE CASE

A. Facts and background.

Plaintiff is a Caucasion adult male who met all residency requirements for the South Bend Fire Department, and defendant, City of South Bend is a municipal corporation in the State of Indiana.

On June 20, 1979, pursuant to concerns raised that minority representation on South Bend's Police and Fire Departments seemed extremely low in comparison to minority representation in the city population as a whole, the South Bend Board of Public Safety appointed a task force to look into those concerns.

After some investigation, the Minority Recruitment Task

Force reported that in the 1978 Fire Department recruiting period, 55 of 194 applications were requested by minorities. Only five (5) minority applicants returned completed applications. The Task Force found the standards for testing and recruiting to be reasonable, and the present system (pre-1980) to not be discriminatory. It was recommended that testing standards should not be lowered and should be maintained.

The defendant Board of Public Safety thereafter decided to adopt an affirmative action plan. Two (2) separate hiring lists, one for minority applicants, and another for non-minority applicants, were maintained.

On July 2, 1980, plaintiff applied for a position as a fire-fighter with the South Bend Fire Department, and between July 19 and October 7, 1980, under-went testing. On November 3, 1980, plaintiff was advised that he had successfully completed testing and was ranked second (2nd) on the non-minority hiring list, second overall.

A few days earlier, it had been apparently decided that five (5) applicants would be hired by the Fire Department. Rather than hire the five (5) individuals with the highest scores (all of whom were white), the Board of Public Safety in keeping with the affirmative

action plan, decided to hire the four (4) top-scoring minority applicants, and the top-scoring non-minority applicant. Plaintiff, though he had outscored all applicants but one, was not considered for employment as a firefighter. One of the four (4) minority applicants hired failed to pass a pension physical and was replaced with the next highest scoring minority applicant.

On May 19, 1982, plaintiff, Janowiak, filed suit against the City in the United States District Court for the Northern District of Indiana, South Bend Division, alleging that he was denied employment contrary to the Fourteenth Amendment of the

United States Constitution, 42 U.S.C. §1983 and §2000e(2)(a)(1). District Court jurisdiction was based on 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-f(f)(3).

B. Decisions Below.

Respondent agrees that the Course of Proceedings as noted in Petitioners' "Decisions Below" at pages seven (7), eight (8), nine (9) and ten (10), is an accurate Summary of the Proceedings, to date.

PETITIONERS' ALLEGATION THAT THE CIRCUITS HAVE CREATED AN IRRECONCILABLE CONFLICT OVER WHETHER THE GENERAL POPULATION CAN BE THE BASIS FOR THE COMPARISON TO JUSTIFY A VOLUNTARY PUBLIC AFFIRMATIVE ACTION PLAN IS WITHOUT MERIT, i.e., THE CASES CITED ARE DISTINGUISHABLE.

Petitioners cite Johnson v. Transportation Agency, ___U.S.___, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987) and its progeny, as support for their proposition that a conflict exists between the Ninth Circuit and Seventh Circuit over whether general population can be considered as the basis for justifying the adoption of an affirmative action plan.

The Seventh Circuit in its Opinion of December 16, 1987, addressed the question as to whether

its Opinion of December 6, 1984, wherein it (the Court) had held statistical disparity, without more, could not justify the adoption of an affirmative action plan (see Petitioners' Appendix, pp. 49a through 85a) was compatible with this Court's ruling in Johnson, supra.

In Johnson, this Court held that the Santa Clara County, California's Transportation Agency did not violate Title VII by taking the gender of applicants for promotion into account. Johnson, the unsuccessful male applicant, and Diane Joyce were two employees who achieved the minimum test score for promotion. Johnson, supra, 107 S. Ct., p. 1457.

This court held that an employer

need not point to its own past discriminatory practices, or to evidence of a Title VII violation to justify adoption of a plan, but needed only to show the existence of a "manifest imbalance" in a traditionally segregated job category. Johnson, supra, p. 1451. It should be noted that there was no evidence before the District Court that the South Bend Fire Department was "traditionally segregated".

The Seventh Circuit in sorting out the differences between Johnson, supra, and the case herein, seemed to find this court's notation that not one of the 238 positions was occupied by a woman important in establishing manifest imbalance,

and the fact that a different standard of review might be in order where the job was classified as a "skilled craft" position, as opposed to unskilled, in referring to the applicable labor pool, in determining a "manifest imbalance".

It is important to note that the Seventh Circuit in its Opinion below noted that the City proferred "absolutely no other evidence of past discrimination, (and that) any proferred statistical comparison must establish a manifest imbalance between the qualified labor pool and the employer's work force." Janowiak v. City of South Bend, 836 F. 2d 1034 (7th Circuit 1987), p. 1039. The Court emphasized that the City's

Minority Hiring Task Force, and the Minority Recruitment Review Committee both concluded the City's hiring standards and practices were non-discriminatory, Janowiak, supra, p. 1039.

Johnson, supra, is furthermore distinguishable from the instant case in that in the case herein, respondent not only brought a Title VII claim, but also claimed that his Equal Protection Rights were violated.

As this court has noted, to survive constitutional muster, an affirmative action plan must be justified by a compelling governmental interest, and that the means chosen by the government must be narrowly tailored to

effectuate the plan's purpose, Wygant v. Jackson Board of Education, 476 U.S.___, 106 S. Ct. 1842 (1987), p. 106. S. Ct. 1852.

In the case below, there was absolutely no evidence of discrimination other than the statistical disparity between the percentage of minorities on the South Bend Fire Department and minority representation among the City's general population to support adoption of a preferential hiring plan. No evidence of a "compelling" governmental interest was demonstrated.

Furthermore, as an affirmative action plan must not "trammel" unnecessarily the interest of non-

minorities, Bratton v. City of Detroit, 704 F. 2d 878, p. 882 (6th Cir. 1983), a finding of "necessity" must be demonstrated. Not only was there no showing of "necessity" by petitioners, the petitioners' Task Force found no evidence whatsoever of overt or implicit discrimination. Furthermore, as this court held in Wygant, supra, p. 269:

> "Societal discrimination alone is insufficient to justify a racial classification. Rather, the court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing the limited use of racial classifications in order to remedy such discrimination." (Emphasis added).

An important aspect of the case herein, that respondent

believes distinguishes his case from that in Johnson, supra, and Higgins v. City of Vallejo, 823 F. 2d 351 (9th Cir. 1987), is the fact that two (2) hiring lists, one for minority applicants, and one for non-minorities, was an integral part of petitioners' affirmative action plan.

In Johnson and in Higgins, neither of the parties allegedly aggrieved had been initially categorized by race. Indeed, in Higgins, the reviewing court noted that the City Charter emphasized that " ... an orderly system of positive recruitment and competitive examinations ... free of all political, religious and racial and other considerations

not consistent with the merit principal ..." was to be followed. Higgins, supra, p. 354.

Furthermore, race was simply a factor that was to be taken into consideration, and that promotion should be granted only to the qualified. Higgins, supra, p. 354.

An essential factor that distinguishes the case herein from Higgins, supra, and Johnson, supra, is that there were, in addition to the noted statistical imbalance, findings and/or conclusions reached by the bodies that promulgated the respective affirmative action plans.

In Higgins, as the Seventh Circuit noted, the California

Fair Employment Practices Commission (FEPC) criticized the City for employing personnel practices that facilitated discrimination, and that the first black fire department employee was not hired until 1964, and that in the history of the fire department, only three (3) blacks had held the position of firefighter-engineer. Higgins, supra, p. 356. In the matter herein, as the Seventh Circuit correctly observed, not only was there no evidence whatsoever of discrimination, the City's own Minority Task Force found the testing standards and procedures fair, reasonable, and non-discriminatory. Janowiak, supra, p. 1039.

Furthermore, in Johnson, as previously noted, not a single one of the county's skilled employees, out of 238, was a woman, and that given the imbalance, it was not unreasonable for the agency to consider, as one factor, the sex of the applicant. The majority in Johnson, therefore, determined the manifest imbalance test was satisfied by the existence of the "inexorable zero". Johnson, p. 1465.

Another distinguishing factor in Higgins, supra, was that the plan did not establish a quota. The Ninth Circuit Opinion observed that the affirmative action plan " ... established by the City of Vallejo is similarly (citing Johnson,

supra), free of rigid quotas and discriminatory exclusions." Higgins, supra, p. 357.

Unlike the situation in Johnson and Higgins, the City of South Bend adopted an affirmative action plan that ab initio, set aside positions for minorities, thus effectively excluding non-minorities. The Seventh Circuit, in its Opinion of December 6, 1984, noted that the Minority Recruitment Task Force adopted a two-to-one preferential hiring plan to reflect, within five years, minority composition of South Bend, Janowiak v. City of South Bend, 750 F. 2d 557, 558 (7th Cir. 1984), and that in fact four (4) minority recruits were hired, while one (1) white

applicant (the only applicant who outscored respondent) was hired. Furthermore, one of the four minority applicants hired failed a required pension physical, and another minority applicant was immediately hired, Janowiak, supra, p. 1036.

What distinguishes Johnson and Higgins from the case herein is that in those instances, race was a factor to be considered in promotion, while in this case, race was the only factor in determining who to hire.

Furthermore, the District of Columbia Circuit in Hammon v. Barry, 826 F. 2d 73 (D.C. 1987), believes that it is still the law of the land that a finding of prior discrimination " ... is a predicate to

remediation", Hammon, supra, p. 74. Furthermore, the Hammon Court, distinguishing that situation from that in Johnson, supra, explicitly noted that the Court in Johnson " ... repeatedly stressed that the plan set aside no specific number of positions for women or minorities". Hammon, supra, p. 78.

In Hammon, in striking down the affirmative action plan, the Court noted the plan " ... on the other hand, employs precisely that which neither Harvard nor Santa Clara embraced -- the tell-tale, single factor, rigid quota." Hammon, supra, p. 79.

Before concluding, respondent wishes to respond to petitioners' claim at pages nineteen (19) and

and twenty (20) that the burden was on respondent to offer evidence that a firefighter needed a special educational background for employment as a firefighter. It was stated by this Court in Johnson, supra, that once a plaintiff establishes a prima facie case that race or sex has been taken into acount (and it would be ludicrous to suggest anything otherwise in the matter herein), the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision, Johnson, supra, p. 1449. Respondent has established a prima facie case, and the petitioner has absolutely no articulable rationale for

establishing a rigid, set-aside, preferential hiring plan.

In conclusion, the apparent conflicts between the Circuits are non-existent. The Seventh Circuit correctly held that the petitioners herein failed to show a manifest imbalance in the qualified labor force (indeed, the petitioner has never attempted to so show), and that the petitioners' plan violates both Title VII and the Fourteenth Amendment.

CONCLUSION

This Court should not grant Certiorari to Petitioners.

Respectfully submitted,

Patrick T. McFadden
220 S. Taylor Street
South Bend, IN 46625
Phone: (219) 233-9338

Attorney for Respondent